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C O N F I D E N T I A L SECTION 01 OF 03 BERLIN 000620

SIPDIS

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TAGS: PREL MARR MOPS GM

SUBJECT: GERMANY: CONSTITUTIONAL COURT RULING COULD RAISE THE BAR FOR MILITARY DEPLOYMENTS

Classified By: DCM JOHN KOENIG. REASONS: 1.4 (B) AND (D).

¶11. (C) SUMMARY: The German Constitutional Court has ruled that allowing German air crews to participate in the NATO AWACS mission in Turkey on the eve of the war in Iraq without first seeking approval of the Bundestag was unconstitutional.

While it is still too early to draw any definitive conclusions about the impact of the Court ruling, there is concern in the German Foreign Office that the ruling significantly widens the scope of what constitutes "the deployment of armed German forces" and what is therefore subject to prior parliamentary approval. The government now faces the possibility of having to seek deployment mandates for a whole range of overseas missions in which small numbers of Bundeswehr soldiers participate that, up to now, have not been covered. Even more significant is the ruling's potential impact on the ability of German units and individual soldiers serving in integrated military formations and commands -- such as NATO AWACS, the NATO Response Force (NRF), EU Battle Groups and SHAPE HQ -- to deploy on a short-fuse basis as required. END SUMMARY.

A Surprise Ruling

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¶12. (U) The German Constitutional Court ruled May 7 that the government's decision to allow German air crews to participate in the NATO AWACS mission in Turkey in 2003, on the eve of the war in Iraq, without first seeking approval of the Bundestag, was unconstitutional. The Court dismissed the assertion of the then-Social Democratic (SPD)/Greens coalition government that the AWACS deployment was just a "routine," unarmed reconnaissance mission, arguing that there were "tangible, factual indicators" that the German AWACS crews could have been drawn into armed conflict. In this regard, the Court noted that the AWACS is not only a reconnaissance aircraft, but also has a fire control function.

¶13. (C) The ruling came somewhat as a surprise because the initial emergency request for an injunction at the time of the AWACS deployment had been denied by the Court. In the large majority of cases, the final decision of the Court follows the same line as its initial ruling. Our contacts at the German Foreign Office told us that the Court had probably decided against granting the initial request for injunction since the AWACS mission had already been launched by the time it heard the emergency petition. The speculation is that the Court did not want to spur a major foreign policy crisis by requiring the immediate termination of German air crew participation in the mission.

## Reaffirmation of a "Parliamentary Army"

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**¶14.** (U) According to a landmark 1994 Constitutional Court decision and a subsequent 2005 Deployment Law, the Bundestag must approve in advance the deployment of any German armed forces outside of Germany. The Deployment Law provides for urgent armed deployments to go forward without the prior approval of the Bundestag in cases where an immediate response is necessary to deal with dangerous situation. However, the government must seek Bundestag permission as soon as possible and if the Bundestag declines to give its approval, the deployment must be terminated. It is important to note, however, that the government has never exercised this ex post facto provision and that most German officials view it as applying in only the most exigent of circumstances, when there is literally no time to obtain Bundestag approval between the outbreak of a crisis and the need to deploy forces.

**¶15.** (U) In the case of the 2003 AWACS mission in Turkey, the government decided that no Bundestag mandate was needed, so it did not seek approval before, during or after the deployment. In its May 7 ruling against this government decision, the Court reaffirmed the Bundeswehr as a "parliamentary army," underscoring that the German Basic Law (Constitution) "entrusted the decision about peace and war to the German Bundestag as the representative body of the people." The Court emphasized that when in doubt about whether it is necessary to obtain Bundestag approval, the government should err on the side of seeking parliamentary

BERLIN 00000620 002 OF 003

permission.

## The Fallout

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**¶16.** (U) The Court decision was the lead story in all the major German newspapers May 8, with most reporting it positively as strengthening the role of the Bundestag in overseeing overseas deployments. The Grand Coalition government, which includes one of the parties that was in power at the time of 2003 deployment (the SPD), reacted cautiously. A spokesman said the ruling would be "carefully analyzed" and that it was too early to draw conclusions about what consequences the Court decision would have on German military deployments.

**¶17.** (C) According to our contacts at the German Foreign Office, which has lead responsibility for preparing government requests for parliamentary deployment mandates, the Court ruling does not constitute a major change in the legal framework for military deployments as provided in the 1994 Court decision and the 2005 Deployment Law. However, they worry it could prove quite troublesome because it seems to significantly widen the scope of what constitutes "the deployment of armed German forces" and what is therefore subject to prior parliamentary approval. The government now faces the possibility of having to seek deployment mandates for a whole range of overseas missions in which small numbers of Bundeswehr soldiers participate that, up to now, have not been covered.

**¶18.** (C) Even more significant according to our contacts is the ruling's potential impact on the ability of German units and individual soldiers serving in integrated military formations and commands -- such as NATO AWACS, the NATO Response Force (NRF), EU Battle Groups and SHAPE HQ -- to deploy on a short-fuse basis as required. The Constitutional Court decision seems to oblige the government to seek Bundestag approval before these German units and individual soldiers can be deployed into any situation where they might come into armed conflict.

Obvious Solution Derided as "Blank Check"

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¶9. (C) One obvious solution to this problem is having the Bundestag give general authorization in advance for German units and individuals assigned to integrated formations to deploy in crises as necessary. This idea has been bandied about over the years, but has always been rejected by most parliamentarians as giving the government a "blank check." MOD Parliamentary State Secretary Christian Schmidt (CSU) publicly raised the idea again this week in the wake of the Court ruling, expressing the hope that some hints on how to solve this "tricky matter" might be found in the details of the Court's decision. However, an MOD Planning Staff contact was pessimistic that, in the end, the idea of advance Bundestag approval would get anywhere.

¶10. (C) The negative reaction of the SPD and opposition parties to a new German security strategy proposed by the Bundestag caucus of Chancellor Merkel's Christian Democratic Union (CDU) and Bavarian sister party CSU gives cause for pessimism. The proposed strategy (reported septel), which ironically was unveiled at an international conference on the same day the Constitutional Court ruling was announced, emphasizes the need to be able to deploy units of the Bundeswehr quickly, especially when they are part of some multinational rapid reaction force responding to an urgent crisis. An early draft of the proposed strategy had explicitly noted the possible need to deploy the Bundeswehr in such circumstances without the prior approval of the Bundestag, and recommended amending the Deployment Law accordingly. SPD Chairman Kurt Beck, as well as spokesmen from all the opposition parties, rushed to the microphones to denounce the CDU/CSU proposal and to declare that the Constitutional Court decision had made such ideas null and void. Ironically, the CDU/CSU, as opposition parties in 2003, had argued at the time that the government's legal justification for bypassing the Bundestag on the AWACS mission was inadequate.

Comment

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BERLIN 00000620 003 OF 003

¶11. (C) It is probably still too early to draw any definitive conclusions about the impact of the Court ruling, but one likely result, at least in the short run, is an even greater cautiousness by the government in committing to and undertaking new military deployments. While the Deployment Law specifically allows for urgent military deployments prior to parliamentary approval, we believe the government will remain extremely reluctant to exercise this option, except in the most extreme emergency situations, for fear of being overruled by the Constitutional Court. With regard to German forces assigned to integrated military formations, there is a lack of appreciation here that in order for rapid reaction forces like the NRF to function as designed, they must be able to count on having all of their assigned personnel available immediately at the outset of a crisis to do mission planning and preparation, and cannot be left wondering whether some units might be ruled ineligible at the last minute, right before deployment.

TIMKEN JR